Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

ELAINE M. KITOWSKI, as
Personal Representative of
THE ESTATE OF LEE WILLIAM
MIRECKI, deceased,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

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ARGUMENT

In the Government's brief in opposition to the petition for writ of certiorari, the Government argues that this Court should not accept certiorari because the Eleventh Circuit opinion in the instant case is not in conflict with other court opinions.[1] Conflict, however, is not the sole requirement for certiorari. The Supreme Court may grant a writ when "a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by the [Supreme Court]."[2] The instant case presents such a question because it is the first opportunity for the Supreme Court to decide whether the *Feres* doctrine bars a Federal Tort Claims Action when the government has committed an egregious and torturous act upon a member of the military. The only case even close to being on point is *United States v. Stanley*, 107 S. Ct. 3054 (1987). However, as discussed in detail in the Petition for Writ of Certiorari, there is a significant difference between *Stanley* and the instant case, and in

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[1] The Government also argues that *Feres* is easy to apply and is just. *See Kitowski v. United States*, Brief for the United States in Opposition, pg. 5-6 (October 7, 1991). While the *Feres* doctrine might seem just and simple to the Government, the doctrine has proven difficult for most courts to apply in practice and even more difficult to accept. The Supreme Court itself has noted that there is no universal definition for the phrase "incident to service," and that the "*Feres* doctrine cannot be reduced to a few brightline rules. . . . [Instead], each case must be examined in light of the [facts]." *United States v. Shearer*, 473 U.S. 52, 57 (1985). In fact, due to the uncertainty as to how courts should interpret the phrase "incident to service," and because of the various tests implemented by judges throughout the country, federal courts all over the country are constantly reaching "unjust" decisions in FTCA decisions involving some relation, no matter how remote, to the military. *See, e.g., Flowers v. United States*, 764 F.2d 759 (11th Cir. 1985). For this reason, it is no wonder why the *Feres* doctrine has been universally criticized as a travesty of justice by knowledgeable persons all over the country, and why many judges have applied the doctrine "reluctantly," "serious[ly] doubt[ing] its theoretical bases," "regret[ing] [its] effect," and suspecting or believing that the doctrine "should be reconsidered." *See, e.g., Scales v. United States*, 685 F.2d 970 (5th Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983); *Peluso v. United States*, 474 F.2d 605 (3d Cir.), *cert. denied*, 414 U.S. 879 (1973); *In re "Agent Orange" Product Liability Litigation*, 580 F. Supp. 1242, 1246-47 (E.D.N.Y. 1984); *Hunt v. United States*, 636 F.2d 580, 589 (D.C. Cir. 1980); Mahoney, *United States v. Stanley: Has the Feres Doctrine Become a Grant of Absolute Immunity?*, 23 NEW ENGLAND L. REV. 767, 816 (1988-89); Gallager, *Servicemembers' Right Under the Feres Doctrine: Rethinking "Incident To Service" Analysis*, 33 VILLANOVA L. REV. 175, 175-76 (1988); Comment, *The Feres Doctrine: Has It Created Remediless Wrongs For Relatives of Servicemen?*, 44 PITT. L. REV. 929, 952-53 (1983).

[2] SUP. CT. R. 10.3.

fact, *Stanley* actually supports Petitioner's argument.

The Government also argues that this Court should not accept certiorari because nothing has changed to warrant the overturning of *Feres*. Petitioner will address this issue later in this brief. However, it is Petitioner's position that recognition of the "egregious misconduct" exception does not require the Court to overrule *Feres*. As detailed in the Petition, Petitioner is asking the Court merely to recognize that *Feres* was never intended to apply to Federal Tort Claims Actions when the acts causing injury are egregious and beyond the bounds of human decency. This is an issue which has never been addressed by this Court in an FTCA action. In fact, since the creation of *Feres* in 1950, the Court has addressed *Feres* in relation to the FTCA only three times. *See Kitowski v. United States*, Brief for the United States in Opposition, pg. 6 (October 7, 1991) (hereinafter Government's Opposition). None of these cases involved egregious misconduct. For this reason, there is no need for the Court to overrule *Feres* in order to provide Mirecki relief. The Court simply needs to recognize the limitations of *Feres*.

The Government, however, raises an important issue in its Brief; that is, has anything occurred since the creation of *Feres* to warrant the overturning of *Feres? See* Government's Opposition at pg. 4. The discussion below addresses this issue, starting with why *Feres* was created in the first place.[3]

From the beginning of the Republic, the United States has enjoyed the protection of the sovereign immunity doctrine.[4] Pursuant to this doctrine, a United States citizen injured in tort by a government employee had the singular remedy of petitioning Congress to pass a private bill for relief.[5] In an effort to provide remedies for wrongful government conduct, Congress enacted the Federal Tort Claims Act in 1946.[6]

The timing of this Act is interesting. In August of 1945, Japan surrendered. This left the United States as secure as any nation has

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[3] The following history was provided by Jack D. Salmon, Ph.D., Professor and Chairman at the University of West Florida, Department of Political Science, in Pensacola, Florida. Dr. Salmon is also an adjunct professor at the United States Naval War College.

[4] *See Feres v. United States*, 340 U.S. 135, 139 (1950).

[5] *Feres*, 340 U.S. at 140; RESTATEMENT (SECOND) OF TORTS § 895A, comment a (1979).

[6] *See Parker v. United States*, 611 F.2d 1007 (5th Cir. 1980).

ever been. The United States was the only major industrial power undamaged by war, had sole possession of the atomic bomb, and had disposed of fleets and armies without rival all across the world. All enemies had been defeated, and the founding of the United Nations in 1945 held out hope of a long period of worldwide peace and progress by the victorious Allies.

The end of the war brought immediate pressure for demobilization of military forces and quick return to "normal" peacetime life. Millions of troops were brought home and released from service within the next eighteen months. This was the world atmosphere when Congress created the FTCA.

The peace was short-lived, however. Attempts to gain Soviet peacetime cooperation failed. Instead, the U.S.S.R began to build in Eastern Europe a ring of satellite nations responsive to Soviet control and garrisoned by massive Soviet forces. In February of 1947, the Government of the United Kingdom, exhausted by both the war and post-war problems, announced that it could no longer play its controlling role in Greece and Turkey. One month later, President Harry Truman asked Congress for authority to aid Greece and Turkey, citing Communist threats. In his message, the President described a general threat from totalitarian regimes and movements, and committed the United States to "support free people." The "totalitarians" the President referred to were the Soviet Communists and, by extension, other Communists wherever found. This "Truman Doctrine" became the basis for numerous United States interventions, military and non-military, around the world during the next forty years.

From 1947 to 1950, numerous threatening events were paraded before the American Government and the public: (a) the Communist coup in Hungary in June, 1947; (b) the Creation of the Cominform (Moscow's organization for control of foreign communist governments/parties) in September, 1947; (c) Communist strikes and actions in France and Italy in late 1947; (d) the Communist coup in Czechoslovakia in February of 1948; (e) the Berlin Blockade in June 1948—May 1949; (f) the Communist victory in China in 1948-1949; and (g) the first Soviet nuclear weapon test in 1949.

The American government and the public perceived these and other events as proof that the nation was endangered. Opinion began to swing toward rebuilding American military power. In mid-1948, President Truman requested, and Congress enacted, the Selective Service Act. In April, 1949, the United States and eleven other nations

signed the North Atlantic Treaty, creating NATO: a Western military alliance specifically directed against possible Soviet attack.

Finally, in 1950, the Cold War became hot. On June 25, 1950, Communist North Korea launched a military invasion of non-Communist South Korea. By October, 1950, Communist Chinese forces entered Korea, and one month later, a massive Chinese counterattack was launched. On December 16, 1950, President Truman declared a state of National Emergency.

This was the international environment that existed on December 4, 1950, when the Supreme Court ruled that the government was not liable under the FTCA for injuries to servicemen arising out of or in the course of activity incident to military service. *See Feres v. United States*, 340 U.S. 135 (1950).

For over forty years, constitutional lawyers, academic scholars and the courts have attempted to look at the *Feres* decision from an intellectual standpoint, and not one has been able to explain how the Supreme Court in 1950 was able to interpret the unambiguous language of the FTCA to bar all injuries arising out of activity incident to service.[7] The FTCA itself specifically includes a definition in the Act to make it clear that "in the case of a member of the military . . . [the FTCA applies to those servicemen] acting in line of duty."[8] The only exception Congress provided to this rule was for a "claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, *during time of war*."[9]

Petitioner respectfully suggests that it was the international environment that existed in the 1950's, and thereafter, which led to the creation of the *Feres* doctrine and its continued existence. For example, from 1951 to late in the 1980's, United States and Soviet relations were dominated by Cold War perceptions and behaviors. Although there was no U.S.-Soviet war, there were periods of confrontation such as the Cuban Missile Crisis and several wars or

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[7] *See, e.g, Bozeman v. United States*, 780 F.2d 198, 200 (2d Cir. 1985); *Monaco v. United States*, 661 F.2d 129, 134 (9th Cir. 1981), *cert. denied*, 467 U.S. 989 (1982); *Hunt v. United States*, 636 F.2d 580, 589 (D.C. Cir. 1980); *Henninger v. United States*, 473 F.2d 814, 815 (9th Cir. 1973), *cert. denied*, 414 U.S. 819 (1973); Bernott, *Fairness and Feres: A Critique of the Presumption of Injustice*, 44 WASH. AND LEE L. REV. 51, 51 (1987); Comment, *The Prenatal Plaintiff and the Feres Doctrine: Throwing Baby out with the Bath Water?*, 20 WILLAMETTE L. REV. 495, 533 (1984).

[8] 28 U.S.C. § 2671

[9] 28 U.S.C. § 2680(j) (emphasis added).

incidents in which the United States battled Communist movements, such as the Vietnam War. Throughout this period, the United States and the U.S.S.R. engaged in military buildups, maintained nuclear forces on constant alert, and directed their foreign and military policies primarily at each other. Under the Reagan Administration (1981-1988), the United States began a major defense buildup, justified as required to answer new Soviet threats.

In December of 1987, however, just six months after the *Stanley* decision, a new revolution began when President Ronald Reagan and Mikhail Gorbachev signed the first superpower treaty to actually reduce the size of nuclear arsenals. One year later, Gorbachev announced unilateral cuts in Soviet forces. Over the next four years, the United States saw the disintegration of the Warsaw Pact, continuing reforms in the Soviet Union, the destruction of the Berlin Wall, and the unification of Germany. In reaction to the times, Congress agreed in 1990 to reduce the military forces by twenty-five percent over a few year period.

But of all the changes, the most sweeping have occurred within the last three months. In August of 1991, a coup against Gorbachev and Soviet reform failed, and the U.S.S.R. began actual disintegration as Union Republics declared their sovereignty. In late September of 1991, just two months after Petitioner filed her Petition for Certiorari in this case, President George Bush announced that all American tactical nuclear weapons would be destroyed or removed from deployment abroad. As part of his message, the President also announced that the forty-year-old airborne alert of American nuclear bombers would be ended immediately.

The Government raised the issue as to whether anything has changed to warrant a reconsideration of *Feres*. Petitioner argues that enough has changed since the filing of the Petition for Certiorari alone to warrant a reconsideration, and certainly enough has changed since the creation of *Feres* to make its underlying reasoning questionable. The Court should stop trying to justify *Feres* from a legal standpoint, and should recognize the doctrine for what it is—a reaction to the times.

Petitioner realizes that it is difficult for the Court to overrule precedent when the American judicial system is based on stare decisis. However, the Court must recognize that precedents often do not work as anticipated. Sometimes the decisions prove too difficult to apply in realistic settings, sometimes the original assumptions

underlying the precedent become inapplicable or simply wrong, and sometimes society itself changes. Eventually, the precedent may become not only unworkable but counterproductive. Eskridge, *The Case of the Amorous Defendant: Criticizing Absolute Stare Decisis for Statutory Cases*, 88 MICH. L. REV. 2450 (1990).

As demonstrated above, *Feres* was created during a time when the country was in need of a strong, autonomous military. There was a perception that we were fighting not only for world peace, but also for survival. Over the past few years, the world political situation has drastically changed. Today, the world powers are meeting on a regular basis and agreeing to unilaterally reduce the military forces. The United States recently agreed that all American tactical nuclear weapons would be destroyed or removed from deployment abroad. Even the conservative leaders of today are demanding a reduction in military expenditures. The time has come to recognize that Feres is an antiquated doctrine that was wrongly decided, and clearly inapplicable today.

The Government contends that it is Congress that should overturn the judicial legislation of *Feres*, not this Court. According to the Government, if *Feres* was wrongly decided, then Congress would have reacted. *See* Government's Opposition at pg. 5. While this makes for a good theoretical argument, it is not very practical. It is common knowledge that this type of legislation is passed because of strong and powerful lobbying. The Lee Mirecki's of the country do not have a lobbying group. Therefore, legislators have little, to no, incentive to respond to Court decisions which harm such groups. The unrepresented must have a forum to raise a denial of their constitutional rights. The forum is this Court, not Congress. As an example of this phenomena, the Court needs to look no further than two of its own decisions regarding racial discrimination. In 1896, the Supreme Court had the opportunity to rule on a case involving an alleged violation of the Fourteenth Amendment when a group of blacks in Louisiana contended they were denied equal protection because they could not sit in the same railroad cars as whites. The Court held that the Louisiana statute did not violate the Constitution because equal protection did not prevent "separate but equal" treatment. *See Plessy v. Ferguson*, 163 U.S. 537 (1896). This Court decision remained the law for over fifty years despite political pressure to pass Congressional legislation. Congress refused to act. It was not until 1954 that this Court overturned the *Plessy* decision. In the case of *Brown v. Board*

of Education, 347 U.S. 483 (1954), this Court ruled that black school children could not be separated from white school children, despite the equal facilities. In reaching its conclusion the Court discussed how society had changed in the fifty year period. *Id.* at 492-494.

CONCLUSION

In order to find for Petitioner, this Court needs to only find that there is no immunity under the FTCA for egregious misconduct. However, a better solution is to correct an obvious misinterpretation that was made over forty years ago. There is today no reason to continue this masquerade, other than stare decisis. If the military is conducting itself in reliance on *Feres* immunity, then this is another reason to grant the petition.

Respectfully Submitted:

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